Supreme Court, U.S.
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No. 93-1785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ORGANIZACION JD LTDA., and
MANUFACTURAS JD LTDA.,

Petitioners,

vs.

UNITED STATES OF AMERICA, DRUG ENFORCEMENT ADMINISTRATION, BANCO ATLANTICO, and THE BANK OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER PETITIONERS MAY HOLD INTERMEDIARY BANKS INVOLVED IN ELECTRONIC FUNDS TRANSFER ("EFT") TRANSACTIONS LIABLE FOR ALLEGED VIOLATIONS OF THE RIGHT TO FINANCIAL PRIVACY ACT, WHEN THE PETITIONERS ARE NOT "CUSTOMERS" OF THE BANKS WITHIN THE MEANING OF THE ACT.

II. WHETHER INTERMEDIARY BANKS THAT PROVIDED INFORMATION TO THE GOVERNMENT CONCERNING EFT'S MAY BE HELD LIABLE FOR ALLEGED VIOLATIONS OF THE ELECTRONIC COMMUNICATIONS PRIVACY ACT, WHEN THE BANKS ACTED IN GOOD FAITH COMPLIANCE WITH *IN REM* WARRANTS AND ADMINISTRATIVE SUBPOENAS, WERE PARTIES TO THE EFT COMMUNICATIONS AND DID NOT "INTERCEPT" THEM.

III. WHETHER THE SECOND CIRCUIT PROPERLY DETERMINED THAT PETITIONERS CANNOT MAINTAIN A CAUSE OF ACTION FOR BREACH OF A THIRD-PARTY CONTRACT BASED UPON THE BANKS' ALLEGED FAILURE TO EFFECT EFT'S NAMING PETITIONERS AS BENEFICIARIES, WHEN PETITIONERS HAD NO RELATIONSHIP WITH THE BANKS AND THE BANKS SEIZED THE FUNDS AND PAID THEM INTO COURT PURSUANT TO COURT ORDERS AND RELATED INSTRUCTIONS FROM THE UNITED STATES ATTORNEY.

LIST OF PARTIES

Pursuant to Rule 24.1(b) of the Supreme Court of the United States, the following is a list of parties to the Petition:

The Petitioners are Organizacion JD Ltda. and Manufacturas JD Ltda.

Respondents are Banco Atlantico, S.A. and The Bank of New York (collectively, the "Banks").

Pursuant to Rule 29.1 of the Supreme Court of the United States, The Bank of New York identifies the following parent companies, subsidiaries and affiliates:

> *The Bank of New York Company, Inc.*, ARCS Mortgage Holdings, Inc., ARCS Mortgage, Inc. (California), Armot Corporation, Armot Corporation of Washington, B.N.Y. Holdings (New Jersey) Corporation, The Bank of New York, N.A., NLB Investment Company, Inc., Natcom Investments, Inc., B.N.Y. Holdings (Delaware) Corporation, The Bank of New York (Delaware), The Bank of New York Overseas Finance N.V., Lease Equities (Delaware) Corporation, Lease Equities (Texas) Corporation, BNY Business Center, Inc., BNY Capital Corporation, BNY International Trade, Inc., BNY Trade Insurance, Ltd., BNY One Leasing Corporation, BNY Personal Brokerage, Inc., Capital Trust Company, Eastern Trust Company, Irving Financial Centers, Inc., North American Bancorp., Inc., The Bank of New York Life Insurance Company, Inc., The Bank of New York Trust Company, The Bank of New York Trust Company of California, The Bank of New York Trust Company of Florida, N.A.;
>
> *The Bank of New York*, BNY Associates Incorporated, BNY Leasing Corporation, Airlease Incorporated, Airlease Foreign Sales Corporation, BNY Capital Funding Corp., BNY New Amsterdam, Inc., Flugel FSC,

Ltd., BNY Waterworks, Inc. (99.09%), BNY Wings, Inc., BNY Wings FSC, Inc., ILC Gear Inc., IRE-1, Inc., IRE-AC, Inc., New GSM Holding Corporation, IRE-Aurora, Inc., IRE-SC, Inc., IRE-BC, Inc., IRE-SB, Inc., IRE-WWP, Inc., Irving Leasing Foreign Sales Corporation, ENMASS, Inc., Flamingo Plaza Realty, Inc., Forty-First Street Holdings, Inc., GH Holdings Inc., Green Island Realty, Inc., Hamlet Holdings, Inc., Horizon at Wayne, Inc., Hulfish Beverage Corp., Hull Junction Holding Corp., IDC (Queens) Corp., Jefferson Plaza Properties Inc., Karpen Properties, Inc., Village Beverage Co., Inc., Landmark Tower, Inc., Linroad Holding Corp., Linroad Realty, Inc., Longtuco Realty Corporation, MacArthur Holdings, Inc., Miami Kendall Properties, Inc., Mid-Plaza Holdings, Inc., MTD Shipping Inc., Newmex Holding, Inc. NO FRILLS, Inc., Odysseus Properties, Inc., One Wall Street Corporation, OVD Holding Inc., Pacshore Holding, Inc., PBP Holdings, Inc., Plymouth Holding Inc., Pohio Holding Inc., PresPark, Inc., Rivohio Holding Inc., Robin Investgments, Inc., Station Mall, Inc., Techcen, Inc., Techcen II, Inc., The Fourten South Broadway Corporation, Valley Premises, Inc., Venetia Realty, Inc., VHPL II, Inc., Walnut Hill Center Corporation, Willowtrail Holding Inc., Wolham Holdings, Inc., Wolpheas Holdings, Inc., Wolstat Holdings Inc., WP Hotel, Inc., Island Waterworks, Inc. (90%), ITC Leasing Corporation, Northern Waterworks, Inc. (99.09%), Waterwheel, L.P. (Partnership) (99%), BNY Generator Lessor, Ltd., BNY Turbine FSC, Ltd., BNY Turbine FSC II, Ltd., BNY Turbine FSC III, Ltd., BNY Turbine FSC IV, Ltd., JCPL Leasing Corp., BNY Financial Corporation, BNY Information Services, Inc., BNY International Financing Corporation, BNY Special Nominees No. 1 Limited, The Bank of New York (Nominees), Ltda., BNY (Nominees) Limited, The Bank of New York Assessoria E. Consultoria, Ltd., The Bank of New

York Capital Markets Limited, The Bank of New York Trust Company (Cayman), Limited, Banco Crediban-co, S.A. (50%), BK Investments, C.A., BNY Australia Limited, BNY Australia Finance Holdings Limited, BNY Worldwide Services Co., Ltd., Compania Dowson, S.A., Irving Trust Company (Nominees) Ltd., Wing Hang Bank, Limited (49%), Banco Weng Hang S.A.R.L., BNY One Capital Corporation, The Bank of New York Commercial Corporation, The Bank of New York Consumer Leasing Corporation, The Bank of New York, S.A., ITCMED, Inc., Sloane Holdings, Inc. (66-2/3%), EPHCO, Inc., LCHCO, Inc., SCHCO, Inc., XYXYXY *Corporation*, *Real Estate Subsidiaries*, 65th Street Townhouse, Inc., 200 Lombard St., Corp., Allohio Holding Inc., Bogohio Holding Inc., Burbank Holdings Inc., Ca-Tar Properties, Inc., Claymont Holding, Inc., Cronos Properties, Inc., Design Center Bus Company, Inc., Eight Stamford Realty Corporation, Empark, Inc., Empro Properties, Inc.

Banco Atlantico has no parent companies or subsidiaries.

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JURISDICTION

Petitioners purport to base jurisdiction on 28 U.S.C. §1254(1).

STATUTES INVOLVED

THE RIGHT TO FINANCIAL PRIVACY ACT

12 U.S.C. § 3401: Definitions

(4) "person" means an individual or a partnership of five or fewer individuals;

(5) "customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name;

12 U.S.C. § 3413: Exceptions

(a) **Disclosure of financial records not identified with particular customers**

Nothing in this chapter prohibits the disclosure of any financial records or information which is not identified with or identifiable as being derived from the financial records of a particular customer.

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, AS AMENDED BY THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986

18 U.S.C. § 2511: Interception and disclosure of wire, oral, or electronic communications prohibited

(2) (c) **It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire,**

oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2520: Recovery of civil damages authorized

(d) Defense. – A good faith reliance on –

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization . . .

. . .

is a complete defense against any civil or criminal action brought under this chapter or any other law.

18 U.S.C. § 2703:

(e) No cause of action against a provider disclosing information under this chapter.— No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, or certification under this chapter.

18 U.S.C. § 2707: Civil action

(d) Defense.- A good faith reliance on -

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization . . .

. . .

is a complete defense to any civil or criminal action brought under this chapter or any other law.

21 U.S.C. § 881: **Forfeitures**

(b) **Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure**

Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims . . ., except that seizure without such process may be made when -

. . .

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture . . . .

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The Banks respectfully submit this Brief in Opposition to Petition No. 93-1785.

A. THE UNDERLYING ACTIONS

This case is closely related to two actions that were before the Honorable Jack B. Weinstein in the United States District Court for the Eastern District of New York, each of which is

in a different procedural posture: 1) *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) ("*All Funds*")[1]; and 2)*Manufacturas Internacional, Ltda. v. Manufacturers Hanover Trust Co., and Consolidated Cases*, 792 F. Supp. 180 (E.D.N.Y. 1992), appeal pending No. 92-7360 (2d Cir. 1992) ("*Consolidated Bank Cases*").

1. *The All Funds Case*

All Funds is a civil forfeiture action brought by the United States, in which Petitioners and others appeared as claimants. A trial by jury resulted in a unanimous verdict forfeiting approximately $10,000,000 to the United States. As described by the Second Circuit, these forfeitures:

> arose out of an international effort to impede the drug-trafficking and money-laundering activities of the Cali cartel . . . The Cartel uses bank accounts throughout the United States, Europe, and Central and South America to store and move its narcotics proceeds. Its funds are moved through various international banks by means of electronic funds transfers (EFTs) for ultimate deposit into Colombian bank accounts.

The jury also returned approximately $300,000 to two of the claimants — the present Petitioners Organizacion JD Ltda. and Manufacturas JD Ltda. — which the jury determined had met their burden of proving that the funds they claimed were not traceable to illegal activities.

By memorandum decision dated August 5, 1992, the District Court denied the claimants' motion for either a new trial or judgment as a matter of law. The Second Circuit affirmed the District Court decision on April 2, 1993, and subsequently denied a petition for rehearing. On March 21, 1994, the Supreme Court denied a petition for a writ of certiorari. The Banks were not parties to *All Funds*.

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[1] Petitioners refer to the *Daccarett* decision as *U.S. v. All Funds on Deposit at Merrill Lynch, Pierce Fenner & Smith, Inc.*, as the case bore that caption in the District Court. To avoid confusion, the case will be referred to here as "*All Funds*".

2. *The Consolidated Bank Cases*

In *Consolidated Bank Cases*, certain claimants in *All Funds* brought actions against the Banks. These actions were consolidated and subsequently dismissed by the United States District Court for the Eastern District of New York pursuant to the grant of summary judgment in favor of the Banks. Following the filing of a Notice of Appeal, appellants, stipulated to withdraw and not reinstate their appeal in *Consolidated Bank Cases* until final resolution, including all appeals, of *All Funds*. Subsequently, the Second Circuit denied appellants' premature motion to reinstate their appeal. Following the denial of the petition for a writ of certiorari in *All Funds*, appellants reinstated their appeal in *Consolidated Bank Cases*. Appellants' brief is to be filed by June 14, 1994.

B. BACKGROUND

The Banks are banking institutions that received court orders and instructions from the United States Attorney for the Eastern District of New York to attach the proceeds of certain electronic funds transfers ("EFTs") pursuant to Warrants of Arrest *In Rem* issued in the *All Funds* civil forfeiture action. Petitioners, two of the claimants in *All Funds*, were the ultimate beneficiaries of certain EFTs attached by the United States.

In July and August 1990, the Banks acted as intermediary banks for the EFTs and complied with court orders and instructions from the United States Attorney to attach the EFT proceeds and pay them into Court. Neither of the Petitioners maintained accounts at the Banks. Rather, Petitioners were customers of Colombian banks which, in turn, maintained correspondent banking relationships with one or more of the Banks. The Banks were instructed by EFT communications to credit funds to the Colombian banks' correspondent accounts in New York. The Colombian banks would, in turn, advise their customers of the credits to their accounts.

Before the Banks received the EFT communications, on or about July 18, 1990, the United States District Court for the

Eastern District of New York issued a Supplemental Warrant for Arrest of Articles *In Rem*, based upon a Third Amended Complaint in *All Funds*, commanding the Banks to attach "all funds transferred to, through and by" the Banks to Colombian banks for the ultimate benefit of certain named beneficiaries and "all related entities and individuals." The United States Attorney's Office had probable cause to believe that these funds represented laundered drug money being transferred from Europe via New York to Colombia.[2]

The Banks, which were required to comply with lawful court orders, had no information with which to determine whether any particular EFT beneficiary was a "related" entity. In order to identify the "related" entities, the United States Attorney instructed the Banks to provide information concerning each EFT directed to accounts maintained with the Banks by the Colombian banks. The United States Attorney identified which beneficiaries were related entities and ordered the Banks to attach specific EFT proceeds. The Banks, in a good faith effort to comply with the warrants of arrest, followed the government's orders.

Over the course of the next several weeks, from July 18, 1990 through August 3, 1990, the United States Attorneys' Office for the Eastern District of New York supplemented these instructions and orders with the Fourth, Fifth, Sixth and Seventh Amended Complaints together with accompanying Supplemental Warrants of Arrest *In Rem*. All of the claimants were specifically identified as entities whose funds were to be attached.

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[2] On May 13, 1991, Magistrate Judge A. Simon Chrein found that the government had shown in this civil forfeiture proceeding probable cause "to believe that the defendant funds constitute the proceeds of narcotics trafficking and/or money laundering" under 21 U.S.C. § 881(i) and 18 U.S.C. § 981(g).

Thereafter, in May 1991, United States District Judge Jack B. Weinstein held a three day evidentiary hearing in which he also determined that there was probable cause to believe the funds were forfeitable.

On July 25, 1990, the Banks were served with a "Summons to Show Cause Why Intangible Property Should Not Be Paid Into Court." This Show Cause Order covered both the funds described in the Warrants of Arrest, and "any and all funds subject to the instant action which are hereinafter deposited, transferred, identified, located, frozen or otherwise discovered or acquired . . . ." The Banks, in compliance with the order, segregated the EFT proceeds and paid them into Court.

C. PROCEDURAL HISTORY

On August 5, 1992, after the conclusion of the *All Funds* trial, the two claimants whose funds were not forfeited, Organizacion JD Ltda. and Manufacturas JD Ltda., commenced the *Organizacion JD* action. Banco Atlantico, The Bank of New York and the United States defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) in November 1992. The District Court granted the motions.

Organizacion JD Ltda. and Manufacturas JD Ltda. appealed from the dismissal to the United States Court of Appeals for the Second Circuit. While the appeal was pending in the Second Circuit, Organizacion JD Ltda. and Manufacturas JD Ltda. petitioned for a Writ of Certiorari to the Supreme Court of the United States. On March 21, 1994, the Supreme Court of the United States denied Petitioners request for certiorari.

On February 24, 1994, after the Banks filed their Joint Brief in Opposition to the petition for certiorari, the Second Circuit rendered its decision in *Organizacion JD*. The decision affirmed the dismissal of all counts against the Banks, but reversed and remanded the portion of the District Court's decision that dismissed Petitioners' claims against the United States Government under 18 U.S.C. § 2707(a) for alleged violations of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2701-2710 ("ECPA"). (Pet. App. B-19-20).

SUMMARY OF THE ARGUMENT

The Second Circuit correctly decided the case below. It determined that the Petitioners were not "customers" within the meaning of the Right to Financial Privacy Act 12 U.S.C. § 3401 *et seq.* ("RFPA") and, therefore, had no claims against the Banks under the provisions of the RFPA.

In addition, no statutory "interception" occurred within the meaning of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (the "Omnibus Act"), as amended by the ECPA. The Banks, as the intended recipients of EFT communications properly received the communications in the ordinary course of their business and complied in good faith with court orders and instructions from the United States Attorney in providing information concerning the EFTs. The Second Circuit properly held that the Banks incurred no liability for having done so.

As to Petitioners' breach of contract claims against the Banks, the Second Circuit correctly held that, even if Petitioners could establish that they somehow were third party beneficiaries of the EFT agreements between the Banks and their correspondent Colombian banks, which they cannot, there could be no breach of contract claim because the intervening government actions in ordering the seizures of the EFT's rendered any enforceable contract impossible to perform.

Therefore, the Petition does not raise any issues that merit review by the Court.

REASONS FOR DENYING THE WRIT

I.

THE SECOND CIRCUIT CORRECTLY DECIDED THE BANKS DID NOT VIOLATE THE RIGHT TO FINANCIAL PRIVACY ACT

The Second Circuit properly held that Petitioners lacked standing under the RFPA. Petitioners incorrectly alleged below that the Banks violated the RFPA by (i) intercepting and holding a wire transfer communication; and (ii) providing government officials with information regarding the EFTs.

The RFPA provides a private right of action against a financial institution only to "customers" of that institution, 12 U.S.C. § 3413(a). Under the RFPA, a customer is any individual or partnership of five or fewer individuals who utilized or is utilizing any service of a financial institution in relation to an account maintained in the person's name. 12 U.S.C. § 3401(4),(5).

Neither of the Petitioners was a customer of the Banks and neither maintained an account with the Banks in its own name. In addition, because Petitioners are neither individuals nor partnerships[3] of five or fewer individuals, Petitioners do not fit within the narrow definition of persons protected by the RFPA. *See Securities & Exch. Comm'n v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 745 (1984) (RFPA "carefully limits the kinds of customers to whom it applies"). The record is explicit that the seized funds were to be credited to the accounts of designated Colombian banks. Even after the funds were seized they were held pursuant to the warrants of arrest and not in accounts maintained by Petitioners at the Banks. *See Ridgeley v. Merchants State Bank*, 699 F. Supp. 100, 102 (N.D. Tex. 1988); *Duncan v. Belcher*, 813 F.2d 1335, 1338-39 (4th Cir. 1987).

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[3] Despite Petitioners' contention that they are "limited partnerships," their motion pursuant to Rule 44.1 of Federal Rules of Civil Procedure, dated September 15, 1992 and filed in *Organizacion JD*, shows that under Colombian law they are in fact "limited liability companies."

The Second Circuit correctly held that the RFPA can be enforced only by customers; since Petitioners are not customers, they have no standing under the RFPA, and cannot rely on it to pursue a claim against the Banks. (Pet. App. B-15-16). Accordingly, the RFPA does not provide a ground for granting the Petition.

II.

THE SECOND CIRCUIT CORRECTLY DECIDED THAT THE BANKS DID NOT VIOLATE THE ELECTRONIC COMMUNICATIONS PRIVACY ACT BY COMPLYING WITH COURT ORDERS AND INSTRUCTIONS FROM THE UNITED STATES ATTORNEY TO PROVIDE INFORMATION CONCERNING EFT COMMUNICATIONS DIRECTED TO THE BANKS

Petitioners also fail to articulate why the Second Circuit's interpretation of the term "interception" merits review by this Court, especially given that the Banks acted pursuant to lawful Warrants of Arrest. It is indisputable that the Banks did not violate the ECPA.

A. As a Matter of Law, the Banks Could Not Have Intercepted Communications Related to the EFTs

Petitioners claim that the Banks violated the ECPA by illegally intercepting EFT communications and by providing to the government information contained in those communications. This claim is seriously flawed. No interception occurred here.

The statute defines the term "interception" as "the aural or other acquisition of contents of any wire, electronic, or oral communications through the use of any electronic mechanical or other device." 18 U.S.C. § 2510(4); *See United States v. Andonian*, 735 F. Supp. 1469, 1472 (C.D. Cal. 1990) (the ECPA applies to "communications which pass from their origin to the intended recipient and are subject to third-party intervention"). The Banks, as intended recipients of the communications, did

not "intercept" but properly received the communications in the ordinary course of their business. No statutory interception did occur or could have occurred here. *See* 18 U.S.C. § 2510(4).

B. The Banks Are Entitled to the Court's Protection

1. *The Banks Acted Under Color of Law*

Even if the Court were to find that the Banks intercepted a communication, no liability would result because that conduct falls squarely within an express exception to the provisions of the Omnibus Act. Section 2511(2)(c) of the Omnibus Act provides,

> It shall not be unlawful under this chapter for a person *acting under color of law* to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. (emphasis added).

The Banks took no independent steps with respect to the EFT communications; they simply abided the court orders and directives of the United States Attorney. Accordingly, even if the Court found that an interception occurred, the Banks' actions "under color of law" would preclude any liability under the Omnibus Act. *See United States v. Barone*, 913 F.2d 46, 48-49 (2d Cir. 1990).

2. *The Banks Acted in Compliance with Court Orders and are Absolved from any Liability*

Even if the Banks were providers of electronic communication services within the meaning of the ECPA, as Petitioners allege, the Banks' compliance with the Warrants of Arrest absolves them of any liability. 18 U.S.C. § 2703(e); 18 U.S.C. § 2520(d)(1); and 18 U.S.C. § 2707(d)(1).

As set forth in 18 U.S.C. § 2703(e):

> No cause of action shall lie in any court against any provider of wire or electronic communications service

> . . . for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena or certification under this chapter.

Similarly, 18 U.S.C. §§ 2520(d)(1) and 2707(d)(1), the statutes authorizing civil actions for interception and disclosure of electronic communications, each provide a complete defense to any action when there is a good faith reliance on a "court warrant or order . . . or a statutory authorization." *See also* 18 U.S.C. § 2511(2)(a)(ii). As the Second Circuit properly decided, the Banks acted in good faith reliance on both warrants and court orders and the statutory authorization granted the Attorney General under 21 U.S.C. § 881(b)(4), and are entitled to the protection of the Court for having done so. ("The Banks should face no liability where they intentionally acted within their perceived legal obligations by following the instructions of the United States Attorney and the court").

III.

PETITIONERS HAVE NO THIRD-PARTY CONTRACT CLAIMS AGAINST THE BANKS

Even if Petitioners were third-party beneficiaries of some contract, the Warrants of Arrest and instructions of the United States Attorney, which required the Banks to seize the transferred funds, made the performance of such a contract impossible.

As the Second Circuit stated:

> Irrespective of whether plaintiffs can even make out a claim as a third-party beneficiary under New York law, the private intermediary banks cannot be subject to a damage action because the intervening government actions in ordering the seizures of the EFTs rendered any enforcement contract impossible to perform.

(Pet. App. B-18).

As a matter of law, impossibility of performance of a contract excuses the non-performing party from liability for breach

of that contract. *See RSB Mfg. Corp. v. Bank of Baroda*, 15 Bankr. 650 (S.D.N.Y. 1981) ("[t]he defense of impossibility extends to judicial action as long as the party seeking to be excused has not caused or failed to prevent the judicial action.")

A. Petitioners Have no Privity with the Banks

Even if performance of a contract were not impossible, Petitioners' claims for breach of a third-party contact must fail because they are not customers of the Banks. Under New York law, a third party may recover for breach of contract only by establishing (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit, and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate assumption by contracting parties of duty to compensate him if the benefit is lost. *Burns Jackson Miller, Etc. v. Lindner*, 59 N.Y.2d 314, 464 N.Y.S.2d 712, 451 N.E.2d 459 (1983); *Rey v. Penn Shipping Co.*, 277 F.2d 905 (2d Cir. 1960) *cert. denied*, 364 U.S. 829; *Penn Steel Co. v. N.Y. City Ry.*, 198 F. 721, 749 (2d Cir. 1912). Petitioners fail to meet the last two criteria.

Petitioners maintain no accounts at the Banks. The only relationship between Petitioners and the Banks is that the Banks were intermediary banks for EFTs, of which Petitioners were the ultimate beneficiaries. Only the beneficiary banks (which would have banking relationships with Petitioners) could credit the Petitioners' accounts with the funds from the EFTs. Petitioners are strangers to the Banks and the Banks owe them no duty or obligation to defy orders of the Court or government agents.

Petitioners contend that an EFT is a "series of transactions. With the completion of each payment order, a bank becomes obligated to pay funds *to the next link in the chain* . . . ." (Petitioners' Br. at 37, emphasis added). Accepting this description as correct, the only relationship relevant to the issues raised here is the banking relationship that the Banks maintain with the next bank in the EFT chain — here, the beneficiary banks with which the Banks maintain correspondent banking relationships.

Generally, in a correspondent banking relationship, a commercial bank such as BNY or Banco Atlantico agrees to provide certain services such as letters of credit, time deposits, bank accounts and collections of checks to another bank.

Petitioners failed to show that they were a direct and intended beneficiary and that the Banks and the beneficiary banks intended to confer some benefit on them in entering into a correspondent banking relationship.[4] As Petitioners utterly failed to meet this burden, the Second Circuit properly dismissed their third-party contract claims.

Petitioners have not shown that the Banks were even remotely aware of their existence until their names appeared on the EFT communications as ultimate beneficiaries. *See Ahmed v. National Bank of Pakistan*, 572 F. Supp. 550, 553-54 (S.D.N.Y. 1983) (plaintiffs could not be intended third-party beneficiaries when defendant bank had no dealings with or knowledge of plaintiffs). Their claims for breach of a third-party contract were therefore properly dismissed.

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[4] Petitioners contend that, by virtue of Regulation J, 12 C.F.R. part 210, there is some contractual relationship between the Banks and the Federal Reserve system to which they are third party beneficiaries (Petitioners' Br. at 34-35). Even if Regulation J could be described as a "contract," nothing in those regulations proscribes a receiving bank from complying with Court Orders or the instructions of the United States Attorney not to complete a funds transfer. *Cf. Manufacturas*, 792 F. Supp. at 193 ("[p]laintiffs failed to prove that the Federal Reserve Act has any application to the seizure of wire transfers by intermediary banks in forfeiture proceedings"). Indeed, the only "agreement" of a receiving bank under Regulation J is to allow the Federal Reserve Bank to credit its account. 12 C.F.R. § 210.29.

CONCLUSION

For the foregoing reasons, the Petition for writ of certiorari should be denied.

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Respectfully submitted,

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